ASIA COMMERCIAL FINANCE (M) BHD

v.

ISLAND RENTALS SDN BHD & ORS

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22(23)-193-1986]
13 MARCH 2002

CIVIL PROCEDURE: *Striking out - Grounds for - Final judgment entered against 1st and 3rd defendants - Whether cause of action against 2nd defendant merged in said judgment - Whether plaintiff estopped from proceeding with action against 2nd defendant - Whether action against 2nd defendant should be struck out*

The plaintiff obtained final judgment against the 1st and 3rd defendants and subsequently against the 4th defendant. The said judgment was obtained in relation to a loan taken by the 1st defendant with the plaintiff. The 2nd, 3rd and 4th defendants were the guarantors. The 2nd defendant applied to have the action against him dismissed on the ground that as final judgment had been entered against the 1st and 3rd defendants on a joint basis, the cause of action against him had been merged in the said judgment. The plaintiff was, therefore, estopped from proceeding with the action against him.

Held:

[1] Apart from any rules of court or any statutory provisions to the contrary, judgment against one joint contractor or tortfeasor is a bar to proceeding against the others. (p 744 b)

[2] Since the 2nd, 3rd and 4th defendants signed the same guarantee, there could be no dispute that it was a joint contract. Each joint contractor has a right to have his co-contractors joined as parties so that all parties can be before the court. Since final judgment had been entered against the other defendants, the 2nd defendant's contract had merged in the said judgment. Therefore, there remained no cause of action against the 2nd defendant. (p 744 d-e)

[Action against 2nd defendant struck out with costs.]

Case(s) referred to:
Parr v. Snell & Ors [1923] 1 KBD 1 ***(foll)***

For the plaintiff - John Clark Sumugod; M/s Sidek, Teoh, Wong & Dennis
For the defendants - Mahinder Singh Dulku (Harjit Singh Sangay); M/s Harjit Singh Sangay & Co

Reported by Usha Thiagarajah

JUDGMENT

RK Nathan J:

Facts

This is the 2nd defendant's application for an order that this suit against him be dismissed or struck out with costs.

The plaintiff filed this suit against the defendants on 8 July 1986. The plaintiff granted a loan to the 1st defendant. The 2nd and 3rd defendants together with one Ahmad bin Hassan (since deceased) guaranteed the said loan. The suit against Ahmad bin Hassan (deceased) has been commenced as being against the personal representatives of the said deceased, as the 4th defendant.

On 18 August 1988 the plaintiff obtained final judgment against the 1st and 3rd defendants. Subsequently, judgment had also been entered against the 4th defendant.

Findings Of The Court

It is the 2nd defendant's contention that the final judgment obtained against the 1st and 3rd defendants on 18 August 1988 was on a 'joint basis' and that therefore the cause of action against him has been merged in the said judgment and the plaintiff is therefore estopped from proceeding with the said action against him. To appreciate the plaintiff's argument, it is necessary to reproduce the relevant para. 5 of the statement of claim which reads as follows:

> By a Letter of Guarantee dated the 7th day of June, 1985, executed by the 2nd and 3rd Defendants and Ahmad bin Hassan, deceased, the 2nd and 3rd Defendant and the deceased agreed jointly and severally the repayment on demand a loan extended by the Plaintiff to the 1st Defendant on the request of the 2nd and 3rd Defendants and the deceased amounting to $320,000, and interest thereon calculated on monthly rests at the rate of 3% above the Plaintiff's base lending rate of 13.5% per annum or such other rate as may be stipulated by the Plaintiff.

It is the plaintiff's case that the 2rd, 3rd and Ahmad bin Hassan, deceased, jointly and severely agreed to repay the loan of the 1st defendant. But in the prayers in the statement of claim the plaintiff claimed in para. 8 as follows:

> The outstanding sum due and owing by the 1st, 2nd, 3rd and 4th Defendants to the Plaintiff as at 31st May, 1986 is $363,249.94 together with interest at the rate of 16% per annum with monthly rests.
>
> Whereupon the Plaintiff claims:
>
> (a) the sum of $363,249.94 as at 31st May, 1986;
>
> (b) interest at the rate of 16% per annum with monthly rests from 1st June, 1986 and overdue interest at 19% per annum with monthly rests until date of payment;
>
> (c) costs;
>
> (d) such further and/or other relief as this Honourable Court deems fit.

It is argued for the 2nd defendant that the vital words jointly and severally were conspicuously missing from the final prayers sought.

It is now necessary to reproduce the order dated 18 August 1988. It reads as follows:

> Pursuant to the Order of Court herein dated the 18th day of August 1988, **IT IS ORDERED** that the Plaintiff be at liberty to enter final judgment against the 1st and 3rd Defendants.
>
> It is this day adjudged that the 1st and 3rd Defendants do pay the Plaintiff the sum of M$405,470.27 as at 30th November, 1986 together with interest at the rate of 16% per annum with monthly rests from 1st December 1986 and overdue interest at 19% per annum with monthly rests until date of full payment and costs.
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> Dated at Penang this day of, ,1988.
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> By Order,
>
> ...
>
> Sgd. Senior Assistant Registrar
>
> High Court, Penang
>
> Entered No: /88
> Clerk.

The order again shows that the words jointly and severally are not included.

Parr v. Snell & Ors [1923] 1 KBD 1 was an action against three joint contractors, for damages for breach of an agreement. The plaintiff obtained an interlocutory judgment for damages, to be assessed, against two of the defendants in default of defence. He then procured an assessment of damages and signed final judgment for the assessed amount against the two defendants who were in default. The court held that apart from any rules of court or any statutory provisions to the contrary, judgment against one joint contractor or tortfeasor is a bar to proceeding against the others. Putting it in another way what it means is that where there are joint tortfeasors and if final judgment is signed against one, the other is discharged. Scrutton LJ went on to say at p. 9 "that the contract is merged in the judgment, and therefore the cause of action on the contract is gone". The issue is to determine whether it was a joint contract. In this case since the 2nd to the 4th defendants signed the same guarantee there can be no dispute that it was a joint contract. In fact the plaintiff relies on such a plea when it pleaded that the defendants "jointly and severally" agreed to repay on demand. The rationale is this. Each joint contractor has a right to have his co-contractors joined as parties so that all parties can be before the court. I agree with the view expressed in *Parr v. Snell (supra)*. Since final judgment has been entered against the 3rd and 4th defendants the 2nd defendant's contract has merged in the judgment entered against the 3rd and 4th defendants and there is now therefore no cause of action against the 2nd defendant remaining. I therefore struck out the suit against the 2nd defendant with costs.